No. 86-454

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

S. KELLERMAN, d/b/a Authorized Sales & Service; LOUIS T. DAVIS & ASSOCIATES, INC.; and BERNARD TUROVITZ,
Respondents.

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

PHYLLIS HESSE,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT PHYLLIS HESSE'S BRIEF IN OPPOSITION

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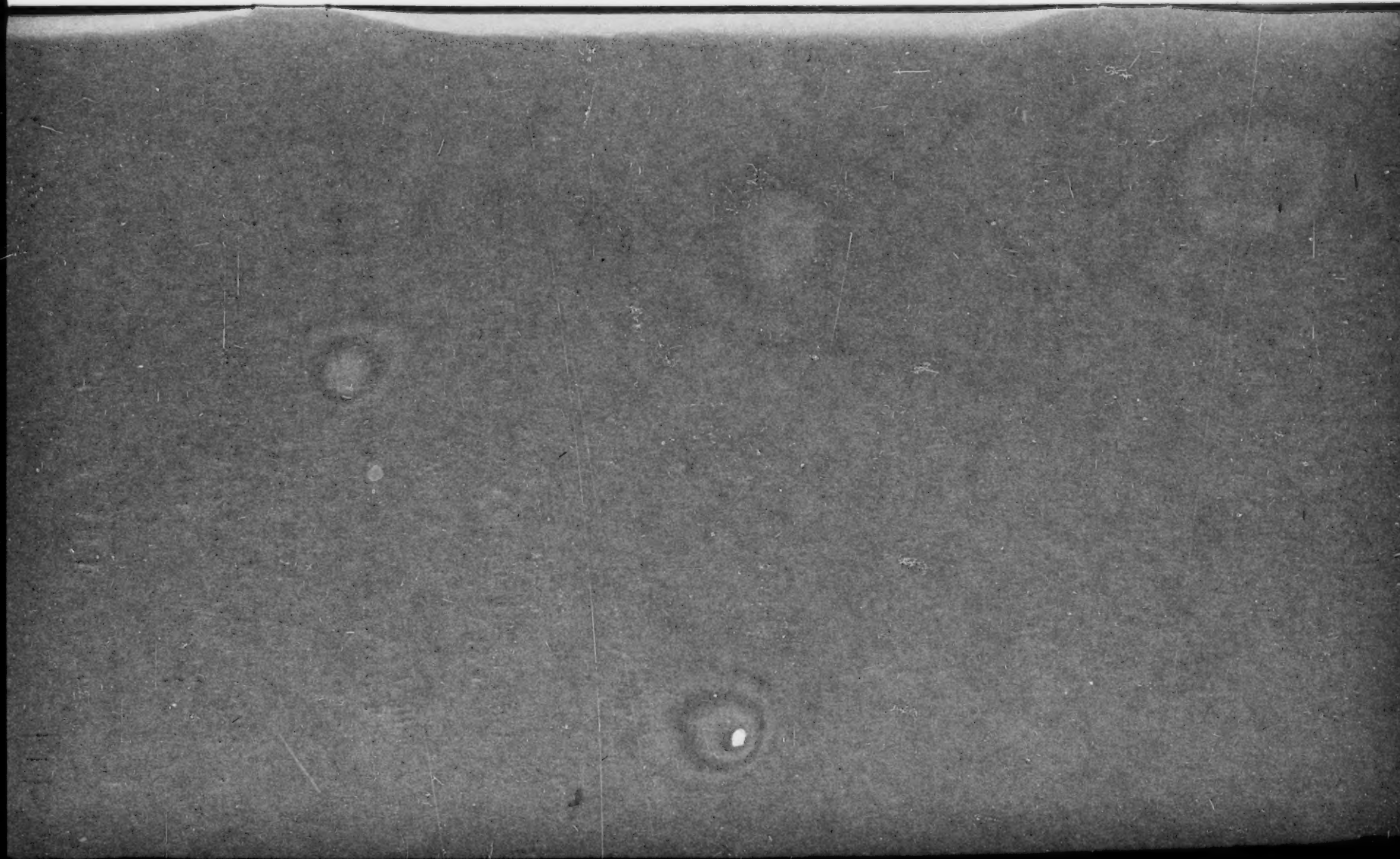

QUESTION PRESENTED

Whether a State Court decision refusing to dismiss claims alleging advertising and disclosure practices in violation of state common law and state statutes presents any issue which is appropriately reviewable by this Court at this early stage of the proceedings.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
ADDITIONAL STATUTE INVOLVED	2
COUNTERSTATEMENT OF FACTS	2
REASONS WHY THE WRIT SHOULD BE DENIED:	
I. NO CONFLICT EXISTS BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE DECISION OF THE ILLINOIS SUPREME COURT IN THIS CASE	6
II. MCI'S PREEMPTION ARGUMENT HAS ALREADY BEEN DECIDED BY THIS COURT AND DOES NOT MERIT REVIEW	9
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	PAGE
Ashley v. Southwestern Bell Telephone Co., 410 F. Supp. 1389 (W.D. Tex. 1976)	10
Bill Correctors, Ltd. v. MCI Telecommunications Corp., Docket No. E-84-11 (F.C.C. 1984)	3, 4, 10, 11
Bruss Co. v. Allnet Communication Services, Inc., 606 F.Supp. 401 (N.D. Ill. 1985)	7
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)	5
Comtronics, Inc. v. Puerto Rico Telephone Co., 553 F.2d 701 (1st Cir. 1977)	5, 10
Great Northern Railway Co. v. Merchants Elevator Co., 259 U.S. 285 (1922)	11
Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F.2d 486 (2d Cir. 1968)	5, 8, 9
Kaplan v. ITT-U.S. Transmission Systems, Inc., 589 F.Supp. 729 (E.D.N.Y. 1984)	7
Kellerman v. MCI Telecommunications Corp., 112 Ill.2d 428, 493 N.E.2d 1045 (1986)	4, 5, 6
MCI Communications v. American Telephone & Telegraph Co., 708 F.2d 1081 (7th Cir. 1983)	7
Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976)	9, 10
Nordlicht v. New York Telephone Co., No. 86-7218 (2d Cir., August 25, 1986)	6, 7, 8, 9
Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961)	11

Statutes

Federal Communications Act, 47 U.S.C. § 414 .. 2, 8, 10

Illinois Consumer Fraud and Deceptive Practices Act, Ill.Rev.Stat., Ch. 121½, §§ 261 *et seq.* ... 3

Illinois Code of Civil Procedure, Ch. 110, § 2-619 . 4

28 U.S.C. § 1332(a) 3

47 U.S.C. § 151 5

49 U.S.C. § 1506 10

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RESPONDENT PHYLLIS HESSE'S BRIEF IN OPPOSITION

Respondent Phyllis Hesse respectfully requests that this Court deny the petition of MCI Telecommunications Corp. for a writ of certiorari seeking review of the decision of the Illinois Supreme Court in this case.

ADDITIONAL STATUTE INVOLVED

Section 414 of the Federal Communications Act, 47 U.S.C. § 414 (1982), states:

> Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

COUNTERSTATEMENT OF FACTS

On August 4, 1983, respondent Phyllis Hesse ("Hesse") filed a two-count class action complaint for damages and injunctive relief against petitioner, MCI Telecommunications Corp. ("MCI"), in the Circuit Court of Cook County, Illinois. Hesse's complaint alleged, *inter alia*, that on or about September 4, 1981, she entered into an agreement with MCI to utilize the latter's long distance phone service; that MCI had represented to the general public, including Hesse, that its billing practices were identical to those of the Bell System; that, unlike the Bell System, MCI knowingly and on a consistent basis billed its customers for uncompleted long-distance calls without disclosing that charges were being imposed for such calls; that MCI failed to disclose its practice of adding an additional minute to the charges it billed where the recipient's phone rang more than six times before it was answered; and that, as a result of this course of conduct by MCI, Hesse and other MCI customers were charged and paid for uncompleted long-distance calls. Hesse's complaint alleged that the aforementioned acts constituted a violation of the

Illinois Consumer Fraud and Deceptive Business Practices Act, Ill.Rev.Stat. ch. 121½, §§ 261 *et seq.*, and common law fraudulent misrepresentation.[1]

MCI filed a Petition for Removal, removing the case to the United States District Court for the Northern District of Illinois. The Petition alleged that the federal court had diversity jurisdiction over the action under 28 U.S.C. § 1332(a). No other basis for federal jurisdiction was asserted.

Upon Hesse's subsequent agreement to eliminate her claim for injunctive relief, MCI agreed to accept remand of the case to the Circuit Court of Cook County, and the case was remanded. MCI then filed a Motion to Stay or Dismiss Hesse's Complaint in the Circuit Court, raising for the first time the issues of federal preemption and primary jurisdiction.

In another matter, the Federal Communications Commission ("FCC") on November 8, 1984 released its Memorandum Opinion and Order in *Bill Correctors, Ltd. v. MCI Telecommunications Corp. et al.*, Docket No. E-84-11. In that case, Bill Correctors, Ltd. had filed a complaint with the FCC alleging that a number of communications carriers, including MCI, had overcharged their customers by billing for incompleted calls as well as for the time period between call placement and connection. Bill Correctors asked the FCC to order the billing practices of the carriers to be disclosed in tariffs filed with the FCC and to require the carriers to honor all claims for refunds of disputed charges. The FCC concluded that the carriers' bill-

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[1] Contrary to the representation in MCI's Petition (hereinafter referred to as "MCI Pet."; MCI Pet. at 4), Hesse's complaint does not contain a breach of contract count.

ing practices need not be contained in the tariffs, but it ordered the carriers to inform the FCC of the means by which they advise customers of the possibility of billing errors and of their credit policies regarding calls of short duration. Finally, the FCC stated that, unless its review of those carriers' submissions revealed that their notification procedures were unsatisfactory, the agency did not anticipate the need for further responsive pleadings in the case.

One of the carriers in *Bill Correctors*, Lexitel Corporation, had filed a cross-complaint seeking relief for the torts of slander and interference with business relationships. Significantly, the FCC dismissed the cross-complaint because, in the opinion of the agency, it raised issues beyond the Commission's jurisdiction.

On November 21, 1984, the trial court in the instant case denied MCI's Motion to Stay or Dismiss. The trial court found that Hesse's claims were not preempted by federal law, that the FCC did not have primary jurisdiction over the case, and that the tests for stay or dismissal pursuant to Section 2-619 of the Illinois Code of Civil Procedure (Ill.Rev.Stat., ch. 110, § 2-619) had not been met.

MCI appealed the trial court's order to the Illinois Appellate Court, which, on June 3, 1985, issued its opinion affirming the trial court. *See* MCI Pet. at C-1. The Illinois Supreme Court allowed MCI's petition for leave to appeal and issued its decision on May 21, 1986, affirming the Appellate Court in all respects. *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 493 N.E.2d 1045 (1986). *See* MCI Pet. at A-1.

In a lengthy and thoughtful opinion, the Supreme Court correctly noted that "[p]laintiffs do not challenge the reasonableness of the additional charges imposed by defendant, but only the fact that its advertising did not disclose

that the additional charges would be made." 112 Ill.2d at 436. The court discussed the preemption doctrine and quoted this Court's enumeration of the "well-established" principles regarding preemption in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). The court then noted the express purpose of the Communications Act, *i.e.*, to " 'make available, so far as possible, to all the people of the United States a rapid, efficient . . . communication service with adequate facilities at reasonable charges.' " 112 Ill.2d at 439, *quoting*, 47 U.S.C. § 151. The court reviewed other pertinent sections of the Communications Act as well. The Illinois Supreme Court found that, although the Communications Act represents a "broad scheme for the regulation of interstate service by communications carriers," 112 Ill.2d at 440, *quoting*, *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 490 (2d Cir. 1968), the court could not agree

> that Congress intended to supplant all State regulation of interstate telephone carriers, no matter how unrelated the State regulation is from Congress' objective of creating an interstate telephone network that is rapid, efficient and reasonably priced.

112 Ill.2d at 440-41. Rather, the court, relying on *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 553 F.2d 701, 707-08 n. 6 (1st Cir. 1977), concluded that the Communications Act's savings clause "preserv[es] causes of action for breaches of duties distinguishable from those created under the Act." 112 Ill.2d at 441, *quoting*, *Comtronics*. Thus, "[s]tate-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by [the savings clause]." 112 Ill.2d at 443.

The court thus concluded that because the claims at issue involve neither the quality of MCI's service nor the reasonableness or lawfulness of its rates, prosecution of these claims would not interfere with the delivery of telephone service to MCI's customers and "any possible effect the litigation could have on defendant's telephone rates is speculative at best." *Id.* at 443-44. The court also noted that plaintiffs here simply seek to hold MCI "to the same standards as they would any other business which advertises on a nationwide basis and which, in the course of its business, is subject to regulation from a number of Federal and State agencies." *Id.* at 443.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

NO CONFLICT EXISTS BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE DECISION OF THE ILLINOIS SUPREME COURT IN THIS CASE.

The only reason presented by MCI for granting the writ is an alleged conflict between the decision of the Illinois Supreme Court and the decision of the United States Court of Appeals for the Second Circuit in *Nordlicht v. New York Telephone Co.*, No. 86-7218 (2d Cir. Aug. 25, 1986).[2] In *Nordlicht*, the plaintiff's complaint alleged that

[2] MCI also cites six federal district court decisions that it contends are in conflict with the decision of the Illinois Supreme Court. Those decisions, however, do not come within the mean-

(Footnote continued on following page)

New York Telephone billed him in American dollars for telephone calls made within Canada and between Canada and the United States when he should have been charged in Canadian currency. Nordlicht's complaint asserted claims against New York Telephone for money had and received and for fraud. Contrary to MCI's assertion (MCI Pet. at 9), Nordlicht's claims did not involve the disclosure practices of New York Telephone.

While Nordlicht challenged the lawfulness of New York Telephone's charging practices, the plaintiff in this case challenges MCI's practice of intentionally misleading its customers through deceptive and false advertising. There is a clear distinction between a challenge to a communication carrier's billing practices, arguably covered by Section 201(b) of the Communications Act, and its deceptive practices with respect to advertising.[3] Furthermore, while MCI relies on *Nordlicht* to support its preemption argument, the *Nordlicht* court specifically found that the claims in that case did *not* arise under the Communica-

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[2] *continued*
ing of a "conflict" under Supreme Court Rule 17. In addition, other federal district courts have agreed with the Illinois Supreme Court that no preemption exists under facts indistinguishable from those presented here. *See, e.g., Bruss Co. v. Allnet Communication Services, Inc.*, 606 F.Supp. 401 (N.D. Ill. 1985); *Kaplan v. ITT-U.S. Transmission Systems, Inc.*, 589 F.Supp. 729 (E.D.N.Y. 1984).

[3] MCI has itself contended that telecommunications carriers continue to be subject to the duties and liabilities imposed by laws other than the Communications Act. For example, in *MCI Communications v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir. 1983) (an antitrust action in which MCI opposed AT&T's defense that the FCC's control over the telecommunications industry rendered the defendant immune from antitrust liability), the Seventh Circuit held that there was no immunity and that, "the allowance of antitrust liability is likely to complement rather than undermine the applicable statutory scheme." 708 F.2d at 1104.

tions Act, but rather were governed by federal common law. *Nordlicht* thus supports plaintiff's position that her claims do not come within the scope of the Communications Act. In any event, the *Nordlicht* court clearly erred in ignoring the existence and significance of the Communications Act's "savings clause."

MCI also relies upon the case of *Ivy Broadcasting Co. v. American Telephone and Telegraph Co.*, 391 F.2d 486 (2d Cir. 1968), in support of its contention that Hesse's claims are preempted. In *Ivy*, the plaintiff brought state law claims against the defendant communications carrier for its alleged gross negligence in providing telephone hook-ups in connection with the plaintiff's broadcasts. The court in *Ivy* concluded that the "congressional purpose of uniformity and equality of rates should be taken to imply uniformity and equality of service" and that the "published tariff rate will not be uniform if the service for which a given rate is charged varies from state to state according to differing state requirements." 391 F.2d at 491. For this reason, the court concluded that "the congressional purpose" could be achieved "only if a uniform federal law governs as to the *standards of service* which the carrier must provide and as to the extent of liability for failure to comply with such standards." *Id.* (emphasis supplied). In *Ivy*, the "standards of service," which were the basis of plaintiff's complaint, could not be considered separately from the uniformity requirements dictated by federal law. No similar considerations apply here, where the duties allegedly breached by MCI are not duties addressed by the Communications Act. In addition, *Ivy* did not acknowledge the existence or significance of the Section 414 savings clause.

The ultimate issue to be resolved in this case is whether MCI's representations and omissions amount to common

law fraud and/or violations of state consumer protection statutes, subjects not addressed by the Communications Act. Thus, neither *Ivy* nor *Nordlicht* is on point, and the Illinois Supreme Court's opinion in this case does not present a conflict with any decisions of the Courts of Appeals.

II.

MCI'S PREEMPTION ARGUMENT HAS ALREADY BEEN DECIDED BY THIS COURT AND DOES NOT MERIT REVIEW.

As the acts complained of by plaintiff Hesse do not relate to MCI's billing practices or rendering of communications services, *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), is dispositive of MCI's preemption argument. In *Nader*, this Court held that plaintiff's common law tort action based on alleged fraudulent misrepresentations by an air carrier did not have to be stayed pending reference to the Civil Aeronautics Board ("CAB") for determination of whether the practice was "deceptive" within the meaning of the Federal Aviation Act ("Aviation Act"), even though the air carrier was subject to regulation by that administrative agency. Nader had been bumped from an overbooked flight on which he had a confirmed reservation. Nader's suit sought relief for common law fraudulent misrepresentation, claiming that the airline failed to inform him in advance of its deliberate overbooking practices. The District Court found for Nader, the Court of Appeals stayed the tort claim pending initial consideration by the CAB, and this Court granted *certiorari*.

Although Allegheny, on appeal to this Court, did not challenge the lower court's holding that the common law claim was not preempted by the Aviation Act, this Court nonetheless considered that question in the course of

rendering its decision. This Court noted that the Aviation Act explicitly provides that it does not "in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 426 U.S. at 298, *quoting*, 49 U.S.C. § 1506. This Court found that "we are not faced with an irreconcilable conflict between the statutory scheme and the persistence of common-law remedies." 426 U.S. at 299.

The instant case is indistinguishable from *Nader*. MCI argues that federal law has preempted the communications field, yet it fails to acknowledge the existence or significance of the Communications Act's savings clause. Section 414 of the Communications Act is identical in substance to the Aviation Act's "savings clause" as interpreted in *Nader*.[4]

MCI contends that the Illinois Supreme Court's decision "ignores the fact that plaintiffs directly challenge MCI's federally regulated charges, practices and tariffs . . . ." MCI Pet. at 10. MCI, however, fails to acknowledge that the FCC, in the *Bill Correctors* proceeding, concluded that the carriers' billing practices *need not* be contained in the tariffs. In addition, MCI has never suggested that the practices of which plaintiff complains—failing to disclose in its advertising that it bills for some unanswered calls and sometimes charges for "ring time"—are set forth in any of its filed tariffs.

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[4] See also, *Ashley v. Southwestern Bell Telephone Co.*, 410 F. Supp. 1389, 1392-93 (W.D. Tex. 1976), where the court found that "the Communications Act of 1934 does not preempt state law in the area of remedies for invasion of privacy" and that "*federal remedies therefore, are cumulative to those already existing at common law or by statute.*" (emphasis supplied); *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 708 n. 6 (1st Cir. 1977).

MCI does not argue here, as it did below, that this case should be referred to the FCC under the doctrine of primary jurisdiction. Yet it nonetheless suggests that the FCC is the appropriate forum for plaintiff's complaints. MCI fails to note that the FCC in *Bill Correctors*, after directing the carriers to inform the agency of the means by which they advise customers of the possibility of billing errors, stated that, unless its review of those submissions revealed that the notification procedures were unsatisfactory, it did not anticipate the need for further pleadings in the case. Furthermore, it is plaintiff's understanding that the FCC has, in fact, not taken further action on those issues since it issued the *Bill Correctors* opinion in 1984.

MCI also argues that the decision below presents the risk of "inconsistent regulation" and that "consistent federal control" over the disclosure practices of interstate telecommunications carriers is needed. This Court, however, has cautioned that the need for uniformity in the application of federal legal standards is not, by itself, a sufficient basis on which federal courts may determine that their jurisdiction is exclusive. *See Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 665-66 (1961); *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285, 290-91 (1922). In addition, the trial court in these consolidated cases has certified nationwide classes as to each of the claims. That fact, together with the fact that there are no other certified classes in state or federal court presenting these same claims, greatly ameliorates any risk of inconsistent adjudications.

Additional factors also militate against the significance of the decision below and present further reasons why this Court should not grant *certiorari*. The order appealed from is interlocutory. Further proceedings will present a

more fully developed record which will demonstrate the lack of any risk of inconsistent adjudications with respect to MCI's disclosure duties and may, in the event plaintiff does not succeed on the merits, moot the issue. Also, as MCI noted in its Motion for an Extension of Time in this Court, the parties are engaged in settlement negotiations, the results of which may moot the entire controversy.

The Illinois Supreme Court has correctly held that its courts present the proper forum for the adjudication of plaintiff's state law claims. The fact that MCI provides interstate telecommunications services and is regulated by the FCC is of no particular import here, where the Communications Act does not address the subject of deceptive and fraudulent practices and where the statute contains a savings clause which clearly preserves plaintiff's state law claims to the extent that they involve duties distinct from those addressed by the Communications Act.

CONCLUSION

For all the foregoing reasons, respondent Phyllis Hesse prays that the writ of certiorari be denied.

Respectfully submitted,

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